(2)

No. 02-1546

Supreme Court, U.S.
FILED
MAY 17 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

RUBICON INC. and LEONARD B. SANFORD,

Petitioners,

versus

JOSEPH E. WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana For The First Circuit

RESPONDENT JOSEPH WILLIAM'S OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

R. BRUCE MACMURDO
LAW OFFICE OF
R. BRUCE MACMURDO, LLC
341 St. Charles Street
Baton Rouge, LA 70802
Telephone: (225) 344-1333
Fax: (225) 344-1308
Counsel of Record
for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THIS CASE DOES NOT RAISE THE ISSUE URGED IN PETITIONERS' WRIT APPLICATION. RUBICON WAS NOT PREVENTED AT TRIAL FROM INTRODUCING EVIDENCE TO DISPUTE THAT MR. WILLIAMS HAD A QUALIFYING HEALTH CONDITION FOR FMLA LEAVE 1

II. WILLIAMS WAS NOT GUILTY OF ANY VIOLATION OF COMPANY POLICY, AS RUBICON ULTIMATELY CONCEDED..... 3

III. THIS CASE DOES NOT SET ANY SIGNIFICANT PRECEDENT FOR LOUISIANA COURTS TO MERIT THIS COURT'S ATTENTION 6

IV. ADDITIONAL MISSTATEMENT OF FACT MADE IN PETITIONERS' APPLICATION.... 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL STATUTES

26 USC § 2611(11) 2

26 USC § 2612(D) 1

29 USC § 2612(a)(1)(D) 3

29 USC § 2613(c)(1) 1

29 USC § 2614(a)(1) 3

SUPREME COURT RULES

Rule 15(1) 7

ARGUMENT

I. THIS CASE DOES NOT RAISE THE ISSUE URGED IN PETITIONERS' WRIT APPLICATION. RUBICON WAS NOT PREVENTED AT TRIAL FROM INTRODUCING EVIDENCE TO DISPUTE THAT MR. WILLIAMS HAD A QUALIFYING HEALTH CONDITION FOR FMLA LEAVE.

Petitioners' writ issue is whether 29 USC § 2613(c)(1) of the FMLA, which provides a procedure for an employer to seek additional medical opinions if it questions an employee's qualification for leave, is "mandatory" or "merely permissive." The practical import of the "Question Presented" is whether an employer is estopped from presenting evidence at trial disputing that the employee's physical condition qualified for FMLA leave when that employer had rejected the employee's medically documented leave request without seeking the opinion of a second medical provider. Rubicon argues that when the Court of Appeal reversed the Trial Court it should have remanded to consider whether plaintiff's condition qualified for FMLA leave (thereby implying that it was restricted from litigating the issue) when a full blown trial on all issues, including whether plaintiff medically qualified for FMLA leave, had already been conducted.

An orthopedic surgeon testified via trial deposition that following knee surgery plaintiff was not capable of performing the functions of his job and was still under the doctor's care when he was fired. P-5 at p.24. An employee is eligible for FMLA leave if he has a "serious health condition" that renders him unable to perform the functions of his position. 26 USC § 2612(D). Plaintiff's surgery

and his need for continuing treatment each qualify as a "serious health condition". 26 USC § 2611(11).

Rubicon was not restrained from presenting any evidence at trial to dispute that Williams' post-surgical knee condition qualified him for FMLA leave but did not do so because it did not contend otherwise. The regular duties of Williams' chemical analyst position required the lifting of 55 gallon drums and standing while testing chemicals for long periods of time, activities that Respondent clearly could not perform at the time he was fired. Rec. 521-22. Rubicon instead argued that, independent of FMLA considerations, it could fire Williams for violating an alleged policy (the existence of which Respondent vehemently denies) that supposedly prohibited an employee from drawing paid sick leave if possibly capable of performing light duty work. When Mr. Sanford was asked if he had any basis on which to contend that Rubicon had not violated the FMLA in firing Williams, he responded, "We weren't thinking in terms of Family and Medical Leave Act, we were thinking in terms of common sense and the fact that he was being paid full medical leave under our sick leave program." Rec. 556.

The Trial Court, whereas expressing the feeling that Rubicon acted unwisely given Williams' exemplary attendance record and excellent performance, erroneously concluded that Williams' burden was to prove that his firing was motivated by anti-FMLA bias but otherwise was subject to "at-will" termination. The Louisiana appellate court reversed, holding that plaintiff had a statutory entitlement to take FMLA leave and be restored to his same position irrespective of the employer's animus. Since Rubicon ultimately conceded that Mr. Williams could not have returned to work even on light duty, the appeal court

found that there was no violation of company policy such as to provide an independent basis for firing Respondent.

The Court of Appeal opinion, while discussing the *Sims* case and the employer's opportunity to seek a second medical opinion if it questions the employee's medical documentation, does so in the context of a fully developed trial record in which the uncontradicted evidence established plaintiff's qualification for FMLA leave. The point of the discussion is that Rubicon officials disdained the FMLA, including the procedures for contesting plaintiff's medical qualification, and even through trial "substituted their own judgment for the medical opinion of Mr. Williams' treating physician." The Court earlier noted that employees with a serious health condition may take leave and then are entitled to reinstatement upon completion of that leave (citing 29 USC § 2612(a)(1)(D) and § 2614(a)(1)) and further that Mr. Sanford conceded that plaintiff was covered by the FMLA. The ultimate holding of the Court of Appeal is that Rubicon violated the FMLA by not restoring Williams to his position.

Rubicon was not restricted in any way from presenting evidence at trial to challenge the plaintiff's medical qualification for FMLA leave. The Louisiana Court of Appeal's holding does not conflict with the *Stekloff* and *Rhoads* decisions. This case does not raise the issue urged by Petitioners in their writ application.

II. WILLIAMS WAS NOT GUILTY OF ANY VIOLATION OF COMPANY POLICY, AS RUBICON ULTIMATELY CONCEDED.

Rubicon contends that the Court of Appeal ignored Rubicon's right to fire Williams (even if qualified for FMLA

leave) for a violation of company policy. Although this contention is not raised as an issue for writ consideration, Respondent feels compelled to set the record straight.

Initially, Respondent vigorously disputes that Rubicon even had a policy that a person recovering from surgery is ineligible for paid sick leave from the moment he becomes able to perform light duty work. This alleged "policy" was not in writing and the Rubicon leave forms do not even address the employee's ability to perform light duty work or not. Rec. 726, P-3, P-4. Contrary to Rubicon's assertion in its brief that plaintiff was told to ask Dr. Morgan if he was capable of performing light duty work after the knee surgery, Mr. Williams' supervisor Aki Miyagi testified that he did not even discuss plaintiff's ability to perform light duty work when Williams informed him of Dr. Morgan's order to stay off work and rehab for three weeks. Given the evidence that Rubicon was oblivious to the FMLA (neither plaintiff nor any of his supervisors had received any information or training about the FMLA), it was most implausible that Rubicon would have adopted a policy, consistent with FMLA requirements, that an employee could insist upon unpaid medical leave even though the company had light duty work it wanted him to do which he was physically capable of performing.

Williams had not missed a day of work for illness for six years prior to his knee surgery. On his own initiative, plaintiff had gone to the library and obtained a book on pre-surgery exercises hoping that he could thus speed his recovery. Williams, who had worked at Rubicon for 16 years without a single negative mark, had hoped to use some vacation time and then return to work with accommodations in order to keep his perfect attendance record intact. Rubicon has throughout the litigation cynically

parlayed plaintiff's volunteerism to perform light duty work while recuperating to concoct a fictitious "policy" which plaintiff allegedly violated.

In any event, as the Court of Appeal held, Rubicon conceded ultimately that Williams could not have returned on light duty and thus that he did not violate the alleged company policy. The evidence at trial was that after Williams was seen on the television news stretching his knee while aiding tornado victims by driving a canteen truck as a Red Cross volunteer, Rubicon's human relations director Len Sanford asked company doctor John Fraiche to contact the treating orthopedic surgeon, Joe Morgan, to determine if Williams could perform light duty work. Rec. 564. Dr. Fraiche called Dr. Morgan's office twice leaving that message; Dr. Morgan's office responded by faxing the operative report and relaying the message that plaintiff was to continue therapy and be seen by Dr. Morgan on the 31st who would then determine "work status and level of work, if any." Joint Stipulation 1, P-9.

Dr. Fraiche later spoke with Dr. Morgan and asked whether Williams was fit to perform light duty work. Joint Stip. 1. Dr. Morgan responded with a letter stating that Williams had required both cartilage removal and an additional operation to scrape out degenerative arthritic changes in two joint surfaces and further stated:

> "Following surgery it is felt that due to the extensive nature of the treatment that physical therapy was indicated. I kept him off work and sent him to physical therapy that was medically indicated. He returned on January 31, 1995. The knee was improved but continued to have some swelling and tenderness in the knee. He has not regained full strength in the knee. Again, I feel

> that physical therapy was again medically indicated for another three weeks beginning January 31, 1995. He has not been released for work at this time." P-1.

Thus, in response to Rubicon's inquiry specifically about whether Williams could perform **light duty** work, Dr. Morgan stated that as of January 31st (the effective date of plaintiff's termination), Williams was still not released to return to work in any capacity but must continue physical therapy. When confronted with Dr. Morgan's letter, Mr. Sanford admitted that Williams had not been cleared by his treating doctor to return to light duty work and thus could not have returned to perform light duty work under Rubicon's policies. Rec. 553-54. This was also confirmed by plaintiff's direct supervisor Aki Miyagi. Rec. 536-37. The Court of Appeal acknowledged Rubicon's right to fire an employee for violating a company policy, even while on medical leave, but made a finding that Williams had not been guilty of any misconduct.

III. THIS CASE DOES NOT SET ANY SIGNIFICANT PRECEDENT FOR LOUISIANA COURTS TO MERIT THIS COURT'S ATTENTION.

Petitioners contend that Respondent's counsel made only "vague and ephemeral" references to the FMLA in depositions which were allegedly inadequate notice of Respondent's intent to pursue an FMLA claim to trigger the deadline for removal. Respondent's counsel stated at Mr. Sanford's deposition in response to an inquiry as to whether Williams was asserting an FMLA claim as follows:

> "I've pled my facts, and I believe that they encompass an FMLA claim."

At Mr. Williams' deposition, Respondent's counsel is quoted as follows:

> "As I stated at the last deposition, we think the pleadings do encompass a claim and he is entitled to relief under the Family and Medical Leave Act."

Petitioners were fully aware that plaintiff was pursuing an FMLA claim but chose to try for a summary judgment in state court rather than invoke timely removal. It is questionable whether a Louisiana court will ever face an FMLA case again, much less one that turns on the issue Petitioners attempt to raise here. The Louisiana Supreme Court did not address the issue but instead denied Petitioners' writ application. This case does not set any significant precedent in Louisiana such as to merit this Court's attention.

IV. ADDITIONAL MISSTATEMENT OF FACT MADE IN PETITIONERS' APPLICATION.

In light of this Court's Rule 15(1), Respondent calls the Court's attention to an additional misstatement of fact in Petitioners' writ application besides those explicitly or implicitly addressed above. Petitioners state that they have been ordered to pay the present value of Williams' salary for the remainder of his working life when the award was for the difference in what Respondent would have made had he remained employed at Rubicon less the projection of the salary he is drawing as a lab technician on the night shift at a hospital, the best paying position which Respondent was able to find through his extensive efforts at mitigation.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted:

LAW OFFICE OF
R. BRUCE MACMURDO, LLC
Attorneys at Law
341 St. Charles Street
Baton Rouge, Louisiana 70802
Tel: (225) 344-1333
Fax: (225) 344-1308